United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

75-7608

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

B

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

P/S

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS EDMUND T. DELANEY AND EMANUEL CELLER ON REHEARING EN BANC

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STATEMENT OF THE CASE

This brief is submitted on behalf of Defendants-Appellants Edmund T. Delaney and Emanuel Celler (the "Unaffiliated Defendants") in support of the decision of this Court filed June 30, 1976 insofar as it reversed the order of District Judge Thomas P. Griesa, directing that the Defendant-Appellant Oppenheimer Fund bear the substantial costs of creating special computer programs to prepare, from business records made available to plaintiffs, a list of names and addresses required solely for the purpose of sending class action notices pursuant to Rule 23(c)(2) Fed. R. Civ. P.

Since the opinion of Circuit Judge Paul R. Hays, dissenting in part, expressed no disagreement with that portion of the opinion of the majority which upheld the contention of all the Defendants-Appellants that such order was appealable under the so-called collateral order doctrine, it is assumed that this point need not be re-argued before the Court en banc.

With respect to that portion of this Court's decision which affirmed the District Judge's order holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., the Unaffiliated Defendants, in order to avoid unnecessary repetition, adopt the statement of the case and the arguments advanced in support of the contention that this action should be dismissed because it is unmanageable as a class action, set forth in the briefs on behalf of the Defendant-Appellant

Oppenheimer Fund, Inc. and the briefs on behalf of the Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash (hereafter referred to as the "Oppenheimer Defendants"). This brief will discuss only the issue of whether the cost of identifying the members of the class is part of the cost of the notice to them required by Rule 23(c)(2), and which must be paid by plaintiffs.

RULE INVOLVED

Rule 23 provides, to the extent relevant to this brief, as follows:

> Rule 23. Class Actions
>
> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
>
> * * *
>
> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.
>
> * * *

QUESTION PRESENTED

IN A CLASS ACTION, IS THE SUBSTANTIAL COST OF SPECIAL COMPUTER PROGRAMMING REQUIRED SOLELY TO IDENTIFY THE NAMES AND ADDRESSES OF MEMBERS OF THE CLASS TO WHOM NOTICE MUST BE SENT PURSUANT TO RULE 23(c)(2) FED. R. CIV. P., PART OF THE COST OF NOTICE WHICH MUST BE PAID BY PLAINTIFFS, WHERE DEFENDANTS HAVE MADE AVAILABLE THEIR COMPUTERIZED BUSINESS RECORDS FROM WHICH SUCH INFORMATION MAY BE OBTAINED? PLAINTIFFS HAVE INDICATED THAT THEY WILL NOT MAINTAIN THE ACTIONS IF THEY ARE REQUIRED TO PAY SUCH COST.

SUMMARY OF ARGUMENT

The decision of this Court in Eisen III and the decision of the Supreme Court of the United States in Eisen IV both hold that the plaintiffs in class actions must pay the costs of the notice to members of the class required by Rule 23(c)(2) of the Federal Rules of Civil Procedure. Such notice necessarily entails the following elements:

(1) identifying the persons who are members of the class and ascertaining their addresses;

(2) preparing the form of notice to be given to them and printing or otherwise duplicating copies of such notice; and

(3) affixing the names and addresses of members of the class to mailing envelopes, inserting copies of the notice in such envelopes and mailing them.

There is no basis in the controlling precedents for holding that the costs of identifying class members may be differentiated from other elements of the cost of giving notice, which is indisputably to be borne by plaintiffs. Nor is there any basis in logic or policy for any such differentiation.

It is also submitted that after District Judge Griesa had correctly ruled that it would be arbitrary and improper for plaintiffs to reduce the size of the class by eliminating those shareholders who had sold their shares, it was manifestly illogical and unfair to require the defendant Fund to bear the cost of identifying all members of the class, as originally defined by plaintiffs themselves, because of the fact that it and the other defendants had justifiably opposed such arbitrary reduction. Judge Griesa also erred in assuming that the major portion of such cost was attributable to the identification of those persons whom plaintiffs had improperly sought to eliminate from the class, when the evidence did not establish that such was the fact.

In any event, it is clear that the Unaffiliated Defendants should not be required to pay any part of the cost of the notice to members of the class.

IN A CLASS ACTION, THE COST OF IDENTIFYING MEMBERS OF THE CLASS IN ORDER TO ENABLE PLAINTIFFS TO SEND THE NOTICE REQUIRED BY RULE 23(c)(2) FED. R CIV. P IS PART OF THE COST OF NOTICE WHICH MUST BE PAID BY PLAINTIFFS.

A. It is Settled that the Cost of the Notice Required in a Class Action by Rule 23(c)(2) Must Be Paid By Plaintiffs.

The decision of the Supreme Court in Eisen IV (Eisen v. Carlyle & Jacquelin, et al., 417 U.S. 156 (1974)) has made it unmistakably clear that the plaintiffs in a class action must bear the cost of individual notice to all members of the class who can be identified through reasonable effort.

The Supreme Court's opinion stated, at pages 175 and 177, that "each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs. * * * we also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class".

It is respectfully submitted that a fair interpretation of the above-quoted language of the Supreme Court's opinion leads to the conclusion that the Supreme Court intended that the plaintiffs should bear the entire cost of notice to members of the

class to whom individual notice should be sent. The opinion nowhere limits the costs to be borne by plaintiffs to the cost of preparing and mailing the notice, as distinguished from the cost of ascertaining the names and addresses of the members of the class to whom the notice should be addressed.

Prior to the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure, efforts to ascertain the names and addresses of potential class members through use of the discovery provisions of the Federal Rules were often denied either as a matter within the court's discretion, Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass., 1962), or as a matter falling outside the purposes of the pre-trial discovery rules, Crabtree v. Hayden, Stone, Inc., 43 F.R.D. 281 (S.D.N.Y., 1967). In Neuwirth v. Merin, 267 F. Supp. 333 (S.D.N.Y., 1967), the court denied a motion for Rule 34 discovery of a stockholder list for use in obtaining the names and addresses of others who might join as plaintiffs in a derivative action:

> "The stockholder list sought to be inspected and copied by the plaintiff does not 'constitute or contain evidence relating to ... matters' within the legitimate purview of F. R. Civ. P. 34 or any other pre-trial discovery and inspection procedure; ..." 267 F. Supp. at 337.

The theory behind these cases, as expressed in Cherner, was that plaintiff had no obligation to notify absent members of a spurious class of the pending litigation. To the extent that

discovery of the names and addresses of members of the class is now permissible, it is because the 1966 amendments to Rule 23 and the holding in Eisen, supra, place the burden on plaintiff to give and pay for notice to the class. See Wolfson v. Solomon, 54 F.R.D. 584 at 591 (S.D.N.Y., 1972) where the court ordered production of documents pursuant to Rule 34 to assist plaintiff in meeting his burden of showing that the elements of a class action were present. Since the discovery here sought is solely for the purpose of enabling plaintiffs to fulfill their obligations under Rule 23, the cost of such discovery should clearly be borne by plaintiffs.

B. The Cost of Identifying Members of the Class is Part of the Cost of the Notice Required by Rule 23(c)(2) and Should Be Paid By Plaintiffs.

The identification of members of the class who are to receive the notice required by Rule 23(c)(2) is patently a step which must be taken in order to give them such notice. The cost of ascertaining the names and addresses of class members to be affixed to the envelopes in which the notice is mailed is necessarily a part of the cost of notice to such members. Neither the opinion of this Court in Eisen III nor the opinion of the Supreme Court in Eisen IV in any way suggest that such cost should be treated in a different manner from the cost of preparing the notice, inserting it in envelopes and mailing them. Nor is there any logical reason for any such differentiation.

It is respectfully submitted that the dissenting opinion of the Honorable Paul R. Hays, Circuit Judge, does not even attempt to make any such logical differentiation, but avoids the question by simply asserting, without any analysis of the steps necessarily involved in giving notice to members of the class and without citing any authority, that "in the instant case ... we deal not with notice costs ... but with class member identification costs" (opinion of Circuit Judge Hays, dissenting in part, page 2).

C. No Valid Basis Has Been Shown for Shifting from Plaintiffs to Any of the Defendants The Cost of Giving the Required Notice under Rule 23(c)(2) which should Normally Be Imposed on Plaintiffs.

It is respectfully submitted that plaintiffs, in their petition for rehearing (at pages 3-7), and the opinion of Judge Hays, dissenting in part, are attempting to apply a very general concept of "fiduciary responsibility" in such an illogical and vague manner, unsupported by any judicial authority or precedent, as to automatically impose the costs of notice (and, perhaps all traditional costs of litigation) on the defendants in any case where one of the defendants is an investment company (or other issuer of securities) and the other defendants are its corporate officers, directors or investment management company. There is no support for this proposition in the precedents respecting class action notice obligations, and the equities certainly do not favor plaintiffs under the facts of this case.

Both plaintiffs and Judge Hays appear to assume that the alleged pre-existence of a so-called "fiduciary relationship" should operate to impose the costs of notice on the defendants who are alleged to be fiduciaries. Judge Hays, for example, asserts that "It is the breach of these fiduciary duties which is at the core of this suit", and that " ... the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress." It is submitted that the bare assertion that an alleged fiduciary has supposedly breached his obligations should not automatically give rise to a potential class action by a plaintiff who is unwilling to bear even the threshhold cost associated with giving the required notice to members of a class which he purports to represent.

Neither Judge Hays nor plaintiffs have cited any precedents which would support the imposition of the burden of these costs upon defendants, nor have they provided any basis for distinguishing notice costs from other litigation costs (e.g., the cost of transcripts of depositions). To adopt a special rule which would relieve plaintiffs from bearing the burden of notice costs could mean that in every case where a breach of a fiduciary duty is alleged, the defendants would be required to finance the litigation against themselves. As the majority noted, "The public interest in enabling the adjudication of claims that could not be maintained in any other form and in having remedial statutes

enforced is sharply offset by the danger, all too frequently realized, of large settlements paid irrespective of the merits of the claim in order to avoid the disastrous expenses of litigation."

Plaintiffs have asserted that the decision of the Supreme Court in Eisen IV supports their position, based on the Supreme Court's citation of Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y., 1968). Thus, at page 4 of plaintiffs' petition for rehearing, it is asserted that

> "In Eisen IV, however, the Supreme Court cited Dolgow v. Anderson ... as an example of a case that might present such an exception to the usual rule. See, Eisen IV, supra, at 178, footnote 15. *** In the portion of the opinion in Dolgow, specifically cited by the Supreme Court in Eisen IV, the Court indicated that a defendant corporation may be required to bear the costs of notice based upon the '[F]iduciary duty owed to purchasers of stock by the corporation ....' Dolgow, supra, at 498".

It is respectfully submitted that plaintiffs' above-quoted reference to that portion of the opinion in Eisen IV which referred to Dolgow is misleading. The text of the Supreme Court's opinion in that regard, together with footnote 15, reads as follows

> "The usual rule is that a plaintiff must initially bear the cost of notice to the class. The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit. 15

---

15 See, e.g., Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (S.D.N.Y., 1968), We, of course, express no opinion on the proper allocation of the cost of notice in such cases." [underscoring supplied]

Moreover, plaintiffs' reference to page 498 of the decision in Dolgow is also misleading, since that court concluded its discussion of the point relating to the so-called fiduciary duty owed to purchasers of stock by stating at page 499: When considered in conjunction with the additional two factors discussed below, we do not think it would always be unreasonable to require a corporation to provide notice once a prima facie case of breach of fiduciary duty has been established." (underscoring supplied) The additional two factors which the court referred to were the purported interest of defendant in res judicata and the respective parties' ability to bear the expense of notice.

But both the factor of ability to bear the expense of notice, and the concept of a preliminary determination as to whether there is a prima facie case of breach of alleged duty were specifically rejected by the Supreme Court in Eisen IV. See Eisen IV, 417 U.S. at pages 176-178. The decision in Dolgow explicitly states, as quoted above, that without such factors there would be no basis for imposing notice costs on defendants notwithstanding the alleged existence of a fiduciary relationship.

Moreover, since the court in Dolgow found that a so-called fiduciary duty existed between a corporation, its directors, officers and other insiders on the one hand, and persons who purchased or sold that corporation's stock on the other hand, the adoption of the rule suggested by plaintiffs would require defendants to bear the costs of notice in all similar cases. In

light of the substantial amount of litigation presently maintained in the federal courts as class actions under allegations such as those, the adoption of a so-called "fiduciary duty exception" would completely negate the Supreme Court's ruling in Eisen IV that "The usual rule is that a plaintiff must initially bear the cost of notice to the class."

Furthermore, the equities do not favor plaintiffs' position under the facts of this case. Although the Fund is named as a defendant in the caption of the action, it is not truly a defendant in the representative action which is the subject of this appeal. Insofar as the Fund is named as a nominal defendant in the derivative shareholder suit, there is clearly no justification for imposing upon it the cost of giving notice to the class, since no such notice is required in the derivative action.

Insofar as the other defendants are concerned, we submit that the decision of the majority of this Court that these costs cannot properly be imposed upon them is clearly correct. In addition to the reasons cited by the majority, we note that in the event the defendants are successful in their defense of this litigation, they will be entitled to indemnification from the Fund for any expenses they were required to advance, including the expense of giving notice. If defendants successfully defend this action, and if, as plaintiffs have suggested in their prior memorandum (Brief of Plaintiffs-Appellees, footnote at Page 59),

such notice costs may not properly be considered as costs of the action and charged against an unsuccessful plaintiff, the defendant Fund will bear the burden of these notice costs.

It would be grossly unfair to the many shareholders of the Fund who are not members of the class (approximately 70,000 shareholders at the time the motion for class determination was made) if the Court were to impose upon the Fund the costs of giving notice to members of the class. The Fund, and its directors, can not properly prefer one group of Fund shareholders over another, and it would be equally inappropriate to use Fund assets to finance an action brought for the personal benefit of less than all of the present Fund shareholders, and for the personal benefit of some persons who are not even shareholders at the present time. The Court should not direct the Fund and its directors to do so.

It is outrageous to suggest, as did plaintiffs' counsel (Petition for Rehearing, page 6), that "If the matter were put to a vote, however, it is reasonable to assume that a majority of the Fund shareholders would approve of the Fund's bearing these expenses, since approximately 60% of the Fund's shareholders are members of the class" (Emphasis in original). Under that theory, 51% of the Fund's shareholders could require the Fund to use 100% of the Fund's assets for their own benefit.

D. The Cost of Giving Notice to All Members of the Class Was Not Caused By Defendants' Actions in Requesting the District Court to Define the Class More Broadly Than Had Been Proposed by Plaintiffs, as Contended by Plaintiffs.

Plaintiffs assert that they "proposed a valid class consisting of all persons who purchased shares of the Fund during the specified period who were still shareholders of the Fund" (Plaintiffs' Brief, page 50), but the District Court granted the defendants' request "to have the class more broadly defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class)" (Plaintiffs' Brief, pages 55-59).

In fact, it was the plaintiffs - not the defendants - who requested that the class be defined to include all persons who purchased shares of the Fund during the specified period, without excluding persons who subsequently sold their shares. Plaintiffs' motion for an order pursuant to Rule 23(c)(1) Fed. R. Civ. P. declaring that this consolidated action be maintained as a class action (Appendix, A-118, 119) expressly requested that the class consist of "the persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970" (Appendix, A-128). It was not until after plaintiffs came to the conclusion that the cost of giving all the members of that class the notice required by Rule 23(c)(2) would be more than they wished

to pay that plaintiffs changed their position and proposed to eliminate members of the class who were no longer shareholders of the Fund. The defendants opposed plaintiffs' attempt to change their position and the District Court found plaintiffs' proposal to be arbitrary and improper.

Plaintiffs assert that such determination by the District Court increased "the cost involved in giving notice". (Plaintiffs' Brief, page 55) In fact, there is no proof that such determination substantially increased the costs of giving notice and it appears likely that the cost of identifying the members of the class would have been substantially the same, regardless of whether the class included or excluded persons who are no longer shareholders of the Fund.

As noted above, it was the plaintiffs - not the defendants - who requested that the class consist of "the persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970" (Appendix, A-128). This was consistent with the express representations which all three plaintiffs had made in their complaints (served, respectively, in March, April and May, 1969) to the effect that each plaintiff brought his action "representatively on behalf of himself and all other persons similarly situated who purchased shares of Oppenheimer Fund, Inc. subsequent to March 15, 1968" (Appendix, A-11, A-34 and A-43). Plaintiffs thereby represented and have continued to represent to all persons who purchased shares of the Fund during the specified

period that plaintiffs were acting on behalf of all of them, not merely such of them as continued to be shareholders of the Fund.

Furthermore, by memorandum and order of District Judge Thomas S. Croake filed December 17, 1969, consolidating for all purposes the actions of the three plaintiffs (Appendix, Index to the Record, A-2), all persons who had purchased shares of the Fund were expressly enjoined from prosecuting any other or further actions seeking the same or similar relief in respect to the transactions referred to in the complaints in all three actions. (Appendix, A-120, 121, affidavit of Donald N. Ruby, sworn to March 30, 1973, paragraph 4.) Shareholders who subsequently sold their shares were in no way excepted or excluded from the injunctive provisions of the order. There is no way of telling whether or how many of these shareholders might have instituted an action if they had not believed that they were being fairly and adequately protected by the plaintiffs or that they were enjoined from bringing action on their own behalf by the order of the court.

Plaintiffs and their counsel cannot in good conscience seek the benefits of Rule 23 as purported protectors of the shareholders of the Fund and then, after the consolidated cases had been pending for 4-1/2 (now 7) years, change their position and seek to eliminate from the class over 18,000 shareholders who sold their shares (the "Former Shareholders"), but still "can be

identified through reasonable effort", merely because the plaintiffs are not willing to pay the cost of giving them the individual notice required under Rule 23 of the Federal Rules of Civil Procedure.

The District Court was clearly right in rejecting plaintiffs' belated attempt to eliminate the Former Shareholders from the class. See Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y., 1971) where, with reference to a motion by plaintiff, made more than two years after the complaint was filed, for an order determining that the action should not be maintained as a class action, the opinion of District Judge Marvin E. Frankel stated, at page 496:

> "In a word, having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender. It is necessary at least that some decent notice be given to those plaintiffs purported to represent so that such members of what was once said to be a class' may appear, if they wish, to oppose the present application, seek to be substituted as representatives or take other steps appropriate for the protection of their interests."

As stated by District Judge Walter R. Mansfield in Guttmann v. Braemer, 51 R.F.D. 537 (S.D.N.Y., 1970) at page 540:

> "When a plaintiff seeks to represent a class he becomes a fiduciary with respect to all of its members. He cannot barter away the rights of some in exchange for the right to represent others." (emphasis in original)

We also note that there is precedent for holding that plaintiffs' actions would have constituted the practical equivalent of a voluntary dismissal of the action as to the Former Shareholders, requiring that they be given notice of their threatened elimination from the class and of their right to seek intervention. In a number of cases, a plaintiff's failure to prosecute a class action has been equated with a voluntary dismissal, requiring that notice be given to the members of the class before an action is dismissed for want of prosecution. See Webster Eisenlohr, Inc., v. Kalodner, 145 F.2d 316, 320 (3d Cir. 1944) cert. denied 325 U.S. 867 (1945); Marcus v. Textile Banking Co., 38 F.R.D. 185 (S.D.N.Y., 1965); Malcolm v. Cities Service Co., 2 F.R.D. 405, 407 (D. Del., 1942); 5 Moore's Federal Practice, Second Ed. ¶41.11(2) at 1116n.5; Haudek, Settlement and Dismissal of Stockholders' Actions, 22 Southwestern Law Journal 767, at pages 776 et seq. (Dec. 1968).

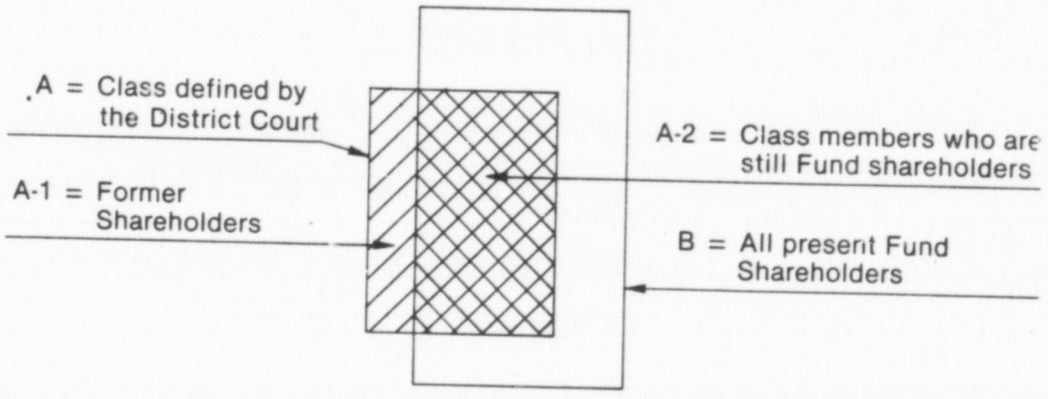
None of the defendants in the instant case initiated any steps whatever to have the class defined more broadly than plaintiffs themselves had represented it to be in their complaints, or than plaintiffs had requested the court to define it in their class action motion dated March 30, 1973 (Appendix, pages A-116-119, A-128). Plaintiffs themselves did not propose that members of the class who were no longer shareholders of the Fund be eliminated from the class until almost nine months later (Affidavit of Donald M. Ruby, sworn to December 12, 1973, Appendix, A-142-144, A-150), after they had concluded that the cost of

giving them the notice required by Fed. R. Civ. P. 23(c)(2) was more than they wished to pay. As stated in paragraph 7 of Mr. Ruby's affidavit (Appendix, A-147):

> "Plaintiffs herein are not seeking by virtue of the procedure proposed by us to depart from the rules set forth in Eisen ... but rather are requesting the Court to direct that notice be given in a manner consistent with the provisions of Rule 23 and the requirements of due process, which they will be able to afford". (underscoring supplied)

But as stated by the Supreme Court of the United States in Eisen IV (417 U.S. 156, at page 176): "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."

Moreover, plaintiffs have completely failed to demonstrate that their proposed reduction in the size of the class would have materially affected the cost of giving notice. In this connection, it may be helpful to depict graphically the groups of shareholders as they would exist under the alternative proposals made by plaintiffs, as set forth below:



It is apparent that whether the class includes only those shareholders who are in Group A-2, as plaintiffs propose, or all shareholders included in both Groups A-1 and A-2, as the District Court found to be required, it will be necessary to create a series of special new computer programs in order to ascertain the names and addresses of class members so that "individual notice to all members who can be identified through reasonable effort" may be given, as required by Rule 23(c)(2). Thus, it does not appear that defendants' opposition to the improper bifurcation of the class attempted by plaintiffs will occasion any substantial increase in costs resulting from the necessity of creating new computer programs to cull out the names of class members. A number of new programs will have to be devised in either event and the evidence does not make it clear that the costs will differ substantially. (See Deposition of Investment Company Service Corporation and Additional Information Supplementing the Same, Appendix, A-195, et seq.)

E. The Reason Stated by Judge Griesa for Requiring the Defendant, Oppenheimer Fund, Inc., to Pay the Cost of Identification of Class Members is Not Warranted by the Facts.

The only reason advanced by Judge Griesa for differentiating the cost of identifying class members from the other costs of giving them the required notice was that "it is defendants who are seeking to have the class defined in a manner which

appears to require the additional expense." But this is clearly not a valid reason because his opinion had previously stated that "plaintiffs' proposal [that members of the class who no longer were shareholders of the Fund should be eliminated from the class] would involve an arbitrary reduction in the class" because "if the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

Furthermore, the evidence adduced as to the cost of culling the members of the class from the names of all the shareholders of the Fund does not establish, as incorrectly assumed by Judge Griesa, that the major portion of the cost of such culling was attributable to the cost of identifying those persons who purchased shares during the pertinent period but are no longer shareholders of the Fund. The evidence on this point is discussed under POINT I D of the Brief of the Oppenheimer Defendants On Rehearing and will not be repeated here.

F. Even if the Cost of Identifying Class Members is Deemed to be a Cost of Discovery, Such Cost Must be Paid by Plaintiffs.

The pertinent decisions in the area of discovery make it clear that such cost must be borne by plaintiffs. It has long been the law that "... a party has no right to require his

opponent to make compilations of information when documents containing the material necessary for the compilations are available to the first party." Leonia Amusement Corp. v. Loew's Inc., 18 F.R.D. 503, at page 507 (S.D.N.Y., 1955).

In Triangle Manufacturing Co. v. Paramount Bag Manufacturing Co., 35 F.R.D. 540, at page 543 (E.D.N.Y., 1964), the court stated that where "compilation would require an inordinate amount of time and effort ... and since an order pursuant to Rule 34 would properly lie for the production of these records, it seems only fair that the party seeking such information be required to bear the burden of extracting and collating it."

In Konczakowsky v. Paramount Pictures Inc., 20 F.R.D. 588, at page 593 (S.D.N.Y., 1957), the Court stated:

> "With regard to those interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, or by doing a little footwork, as the case may be."

See also, United Cigar-Whelan Stores Corp. v. Philip Morris Inc., 21 F.R.D. 107 (S.D.N.Y., 1957); Wirtz v. Donovan Contracting of St. Cloud, Inc., 23 F.R. Serv. 2d 777 (D. Minn. 19[illegible]).

This procedure has now been recognized in Rule 33(c) of the Federal Rules of Civil Procedure which permits a party to

respond to interrogatories by affording the party seeking discovery "... reasonable opportunity to examine, audit or inspect [relevant business] records and to make copies, compilations, abstracts or summaries."

Where the information sought was in the possession of a non-party and the court found that the search for and production of the information and documents would be time consuming and expensive, the party seeking discovery was required to pay the reasonable expenses thereof. See Celanese Corp. v. E.I. duPont de Nemours & Co., Inc., 58 F.R.D. 606 (D. Del. 1973).

Insofar as computerized records are concerned, the Manual for Complex Litigation (1973) at §2.715, notes: Discovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information." The Manual notes that in circumstances where the information may not have "been recorded in the computer in a form which will be of the greatest benefit to the examining party," such examining party may be permitted "to develop his own programs for the analysis or reorganization of the machine-readable data so as to convert the information into a form that is more germane to the examiner's defense or prosecution of the action."

Adams v. Dan River Mills, Inc., 54 F.R.D. 220 (W.D.Va., 1972), a case involving the production of computerized information as part of the discovery process, placed the cost of

preparing the information on the party seeking discovery of such information. In that case, the court referred to the 1970 revisions of Rule 34, and the notes of the Advisory Committee on Rules pertaining thereto. The court held that computer in-put information such as computer cards or tapes could be the subject of discovery, and ordered "that the defendant produce its current master payroll file and the requested W-2 print-outs in the appropriate computerized form." The court further ordered that the cost of preparing these documents be borne by the plaintiffs, who had requested the discovery.

For the foregoing reasons, the Unaffiliated Defendants respectfully submit that plaintiffs must bear the expenses of ascertaining the names and addresses of the members of the class even if those expenses are treated as part of the cost of discovery.

CONCLUSION

This action should be dismissed because it is unmanageable as a class action. But if this Court en banc adheres to that portion of the Court's decision filed June 30, 1976 which affirmed the District Court's determination that the action is properly maintainable as a class action, it is respectfully submitted that it should also adhere to that portion of its decision

which reversed the District Court's order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the class members.

Respectfully submitted,

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